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Sustainable Development as a Constitutional Value

Keywords: principle of sustainable development, Constitution of the Republic of Poland

Słowa kluczowe: zasada zrównoważonego rozwoju, konstytucja RP

Abstract

The aim of the study is to draw attention to the principle of sustainable development, which is contained in the Article 5 of the Constitution of the Republic of Poland. As a constitutional value, it certainly refers to such goods as ensuring environmental protection and protection of human and civil rights. It is a systemic principle and its main purpose is to oblige public authorities to undertake specific socio-economic and political activities taking into account present and future generations. This principle is analyzed in many sciences, most often in economic and administrative-legal terms. There is no single, legal definition of this principle, which would allow for the uniformity of interpretation of the legal provisions referring to its application and observance.

Streszczenie

Zrównoważony rozwój jako wartość konstytucyjna

Celem opracowania jest zwrócenie uwagi na zasadę zrównoważonego rozwoju, która zawarta została w artykule 5 Konstytucji RP i odniesienia jej w przepisach prawa administracyjnego. Jako wartość konstytucyjna odnosi się na pewno do takich dóbr jak zapewnienie ochro-

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ny środowiska i ochrony prawa człowieka i obywatela. Jest to zasada ustrojowa i jej celem jest przede wszystkim zobowiązanie organów władzy publicznej do podejmowania określonych działań społeczno-gospodarczych i politycznych mając na uwadze obecne i przyszłe pokolenia. Zasada ta analizowana jest w wielu naukach, najczęściej w ekonomicznych i administracyjno-prawnych. Nie ma jednej, legalnej definicji tej zasady, co pozwalałoby na jednolitość interpretacji przepisów prawa odsyłających do jej stosowania i przestrzegania.

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The term ‘sustainable development’ is undoubtedly a constitutional value, as indicated in the Article 5 of the Polish Constitution. It often is used in legal regulations that indicate sustainable development of a country, region or environment. This term often is used in management and economic sciences, as well as in journalistic and colloquial language. It became a kind of key, thought formula or concept-tool, without one universal definition.

The aim of the study is to present the constitutional aspect of this term and its understanding in the doctrine and case law. For example, the scope of referring to the principle of sustainable development in administrative law also is shown.

I. The Principle of Sustainable Development in the Article 5 of the Polish Constitution

The Article 5 of the Constitution of the Republic of Poland provides that “the Republic of Poland shall safeguard the independence and integrity of its territory, ensure human and citizen freedom and rights and the security of citizens, protect national heritage and ensure environmental protection, guided by the principle of sustainable development”. In connection with this article, two lines of views emerged in the doctrine. According to the first, the principle of sustainable development refers only to ensure environmental protection, while proponents of the second trend indicate that this principle applies to all the matter listed in this provision². These views are prevailing. The divergence

² Z. Bukowski, *Zrównoważony rozwój w systemie prawa*, Toruń 2009, p. 23; M. Pchałek, [in:] *Prawo ochrony środowiska. Komentarz*, eds. M. Górski, M. Pchałek, W. Radecki, J. Jerz-

of views is pointed out by B. Rakoczy, explaining that the interpretation of this provision, which recognizes that the principle of sustainable development covers all the obligations listed therein, is indicated by the use of the comma by the legislator after determining the obligation to ensure environmental protection³. According to this understanding, this principle is a systemic principle. And if so, it should be considered both in the process of making law and applying law. A. Bałaban points out that recognizing the principle of sustainable development only in relation to environmental protection would be an excessive narrowing of its content, which “significantly exceeds the issues of environmental protection – traditionally understood”⁴. The correctness of this statement is confirmed by the analysis of the provisions of many acts regulating various areas of public life, which includes a reference to sustainable development, e.g. spatial planning, public transport, water law, urban development policy. This means that since this principle defines the main directions of state activity and objectives of its operation and determines the scope of responsibilities of state organs, it also refers to actions taken by local government. “Raising the principle of sustainable development to the rank of a constitutional principle causes the state to fulfill its basic functions specified in the Article 5 of the Constitution. This applies to all state organs, i.e. public authorities. This includes legislative, executive and judicial bodies in all their activities”⁵. This is due to the fact that, as P. Sarnecki states, Article 5 in terms of its legal nature is included as a programmatic provision requiring all public authority factors to join, through all their competences, in the actions indicated there⁶.

B. Rakoczy states that “the consequence of adopting the broader meaning of the principle of sustainable development is its application to other areas of so-

mański, M. Bar, S. Urban, J. Jendrośka, Warsaw 2011, pp. 125–130; R. Mikosz, *Zagadnienia wstępne*, [in:] *Zrównowagony rozwój jako czynnik determinujący prawne podstawy zarządzania geologicznymi zasobami środowiska*, ed. G. Dobrowolski, Katowice 2016, p. 14.

³ B. Rakoczy, [in:] *Prawo ochrony środowiska. Komentarz*, eds. Z. Bukowski, E.K. Czech, K. Karpus, B. Rakoczy, Warsaw 2013, p. 19.

⁴ A. Bałaban, *Konstytucyjna zasada zrównowagonego rozwoju*, [in:] *Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje*, eds. L. Garlicki, A. Szymt, Warsaw 2003, p. 20.

⁵ Z. Bukowski, *Konstytucyjne podstawy obowiązków państwa w zakresie ochrony środowiska*, “Prawo i Środowisko” 2002, No. 4, p. 63.

⁶ P. Sarnecki, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. vol. I, eds. L. Garlicki, M. Zubik, Warsaw 2016, LEX.

cial life – both those explicitly mentioned in the Article 5 of the Constitution of the Republic of Poland and others, which this provision does not expressly mention”⁷. The author further claims that: “This provision refers to the obligations of the Republic of Poland. Therefore, where there are doubts as to the scope of duties, types of duties and methods of their implementation, the principle of sustainable development should be used. The consequence of the nature of the principle of sustainable development is the view that this principle, as an interpretation directive, should not be defined. It should therefore play a similar role in environmental protection law, which are played by general clauses (principles of social coexistence or socio-economic purpose of law) in civil law”⁸. Nevertheless, the view of Z. Bukowski states that the provision of this article lists tasks to which it will be impossible to apply this principle directly, e.g. in relation to safeguarding the independence and inviolability of the territory of the state⁹.

Interpretation differences in the provision result mainly, as noted by J. Zimmermann, from its not very precise formulation. However, despite the controversial nature, “when one considers the catalog of values listed in Article 5, as well as the programmability of the principle assumed by the Constitution, it must be assumed that it does not refer only to environmental protection, but at least also to national heritage and freedom and citizens’ rights. Sustainable development should consist in conducting all development processes in such a way as to maintain a balance between regions, between human needs and people’s aspirations, and between investments made and the limitations that they may cause, between current needs and the needs of future generations, etc.”¹⁰. Reference of the principle of sustainable development also to human and civil rights and freedoms means that it has a direct impact on their legal situation. This means that sustainable development should be seen not so much for each individual person, but for humanity as such, covering both present and future generations. Therefore, the principle of sustainable development has a universal, not individual dimension¹¹.

⁷ B. Rakoczy, *op.cit.*, p. 19.

⁸ *Ibidem*, pp. 19–20; judgment of the Supreme Administrative Court of April 2, 2015, II OSK 2123/13, LEX No. 2089921.

⁹ Z. Bukowski, *Zrównoważony rozwój w systemie...*, p. 456.

¹⁰ J. Zimmermann, *Prawo administracyjne*, Warsaw 2018, pp. 169–170.

¹¹ B. Rakoczy, *op.cit.*, p. 20.

II. Sustainable Development in EU and International Law

Article 11 of the Treaty on the Functioning of the European Union¹² indicates: “In establishing and implementing Union policies and activities, in particular, in order to promote sustainable development, environmental protection requirements must be taken into account”. Article 26.3 provides for sustainable progress in all relevant sectors. Also, the Treaty on European Union¹³ refers in its provisions to this principle, stating that the Union shall work for the sustainable development of Europe based on sustainable economic growth (Article 3.3). The provisions of many EU directives¹⁴, as well as the so-called soft law¹⁵, also refer to sustainable development.

The definition of sustainable development is contained in Article 3.1 of the Convention on cooperation in the field of the protection and sustainable development of the marine and coastal environment in the Northeast Pacific, signed in Antigua on February 18, 2002. It specifies that sustainable development means a process of progressive changes in the quality of life of people who are the central and primary development entity, through economic growth taking into account social equality and changing production methods and consumption patterns, which ensures sustainable ecological balance and support for the region. This process implies respect for regional, national and local ethnic and cultural diversity, full social participation in peaceful coexistence and harmony with nature, without compromising the quali-

¹² Dz.U. 2004, No. 90, item 864/2.

¹³ Dz.U. 2004, No. 90, item 864/30.

¹⁴ E.g. Regulation (EU) 2017/1601 of the European Parliament and of the Council of September 26, 2017 on the establishment of the European Fund for Sustainable Development (ERDF), the EFFD guarantee and the EFFD guarantee fund (Journal of Laws EU L of September 27, 2017, 2017.249.1); Directive PE/Council 98/70/EC of October 13, 1998 relating to the quality of gasoline and diesel fuels and amending Council Directive 93/12/EEC (Journal of Laws EU L of December 28, 1998, 1998.350. 58), as amended by Directive EP and Council 2009/30/EC (Journal of Laws EU L of June 5, 2009, 2009.140.88); Directive 2009/28/EC of the EP and Council of April 23, 2009 on the promotion of the use of energy from renewable sources (Journal of Laws EU L of June 5, 2009).

¹⁵ E.g. Commission Communication to the Member States of September 2, 2004 establishing guidelines for the Community initiative in the field of trans-European cooperation, which aims to encourage the harmonious and balanced development of Europe (Journal of EU C of September 10, 2004, 2004.226. 62).

ty of life of future generations. B. Ziemblicki emphasizes that this definition is important because it is a legal definition, it is detailed and extensive, but its weakness is that it was included in a regional act to which only a few countries joined¹⁶. The author also notes that despite the fact that sustainable development appears in many international documents, both of the United Nations and interstate, there is not only a lack of its legal definition, but also a binding legal act in this area¹⁷.

The analysis of these regulations, as well as documents adopted under the auspices of the United Nations, carried out with considering the provisions of the Article 5 of the Constitution, confirms the legitimacy of a broader view of the principle of sustainable development, not only in relation to environmental protection.

III. Interpretation of the Principle of Sustainable Development in Case Law

The broad understanding of the principle of sustainable development has been confirmed in the jurisprudence of the Constitutional Tribunal. In the judgment of June 6, 2006 regarding the declaration of compliance with the constitution of certain provisions of the act of April 10, 2003 on special principles for the preparation and implementation of investments in national roads (the applicants' allegation concerned a violation of the Article 5 of the Constitution), The Constitutional Tribunal stated: "The principle of sustainable development includes not only nature protection or shaping spatial order, but also due care for social and civilization development, related to the need to build appropriate infrastructure necessary for – taking into account civilization needs – human life and individual communities. The idea of sustainable development therefore includes the need to take into account and balance of equal constitutional values"¹⁸. The content of this judgment is repeatedly referred to by the Supreme Administrative Court, stating that the principle of sustainable devel-

¹⁶ B. Ziemblicki, *Zrównoważony rozwój z perspektywy prawa międzynarodowego i europejskiego*, [in:] *Rozwój trwały i zrównoważony*, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu", Wrocław 2016, No. 452, p. 153.

¹⁷ Ibidem, p. 157 and the literature views given there.

¹⁸ K 23/05, OTK-A 2006, No. 6, item 62.

opment should be used when there are doubts as to the scope of obligations, the type of obligations and the manner of their implementation by public administration bodies. It plays a role similar to the principles of social coexistence or socio-economic destiny in civil law. The court also indicated that in the first place the legislator is obliged to consider the principle of sustainable development in the process of legislating but on the other, this rule should be taken into account by law enforcement authorities. It emphasizes that under the principle of sustainable development is not only the protection of nature, but concern for social development and civilization, associated with the necessity of building an appropriate infrastructure¹⁹. Such a sentence was also expressed by the Provincial Administrative Court in Gorzów Wielkopolski in its judgment of March 25, 2009, at the same time indicating that sometimes the facts of a given case require consideration and balancing of more favorable solutions using the principle of sustainable development²⁰. Similarly, the Provincial Administrative Court in Warsaw in its judgment of June 23, 2009 pointed out that the Polish legal system did not establish the principle of primacy of environmental protection over other values. The framework for considering environmental protection is determined by the principle of sustainable development (Article 5 of the Polish Constitution), according to which the administrative body deciding in the case should also consider the conditions related to socio-economic development²¹.

Analyzing the principle of sustainable development under the provisions on spatial planning and development, the administrative court stated that the principle of sustainable development should not only provide the municipality with tourism and leisure development, but also cause the municipality to strive for comprehensive development, including the economy and industry, in line with local possibilities, and considering local and supra-local needs. Each municipality must also be able to develop increasing residential, industrial zone or service. The principle of considering the

¹⁹ Compare e.g. the judgment of the Supreme Administrative Court of July 7, 2006, II OSK 507/06, LEX No. 275511; judgment of the Supreme Administrative Court of October 26, 2011, II OSK 1820/11, LEX No. 1152061; judgment of the Supreme Administrative Court of April 2, 2015, II OSK 2123/13, LEX No. 2089921.

²⁰ II SA/Go 825/08, LEX No. 526352.

²¹ IV SA/Wa 1269/08, LEX No. 564009.

current purpose and development of the area in the planning procedure is not intended to reduce the planning procedure only to preserve the existing state of affairs²².

In the light of these examples of judgments, the position that this principle should be combined with the second system principle – the principle of proportionality, is also correct. “Both do not allow any interference by public authorities in the broadly understood social life. Any decision of state authorities must be rational enough to be justified from the point of view of sustainable development. Therefore, public authorities always should be guided by the guiding principle of continuous development, in the process of which the constitutional social, economic and environmental values should be proportionally balanced”²³.

IV. Examples of References to the Principle of Sustainable Development in Administrative Law

The only definition of sustainable development in Polish law is in the act of April 27, 2001 – Environmental Protection Law²⁴. Pursuant to Article 3 point 50, if this act refers to sustainable development, it shall mean such socio-economic development in which the process of integrating political, economic and social activities occurs, while maintaining natural balance and sustainability of basic natural processes, to guarantee the ability to meet the basic needs of individual communities or citizens of both the modern generation and future generations. A definition with similar content was included for the first time in the previously applicable act of January 31, 1980 on the protection and shaping of the environment²⁵ pursuant to the act of August 29, 1997 amending the act on environmental protection and shaping, and amending certain acts²⁶.

²² Judgment of the Provincial Administrative Court in Szczecin of November 23, 2011, II SA/Sz 942/11, LEX No. 1153370.

²³ A. Krzywoń, *Konstytucja RP a środowisko*, “Państwo i Prawo” 2012, No. 8, p. 3.

²⁴ Unified text Dz.U. 2018, item 799, as amended.

²⁵ Unified text Dz.U. 1994, No. 49, item 196 as amended.

²⁶ Dz.U. No. 133, item 885.

Sustainable development is also the basis for shaping spatial policy by public administration bodies and determining the principles for the development and development of specific areas – based on the act of March 27, 2003 on spatial planning and development²⁷. It should also be noted that the act clearly indicates that whenever it mentions sustainable development, it should be understood as development as defined in the Article 3 point 50 of the Environmental Protection Law. The act of September 28, 1991 on forests²⁸ uses the term sustainable forest management, which in Article 6 point 1a defines as follows: it is “activities aimed at shaping the structure of forests and their use in a manner and pace that ensures the permanent preservation of their biological richness, high productivity and regenerative potential, viability and capacity to fill, now and in the future, of all important protective, economic and social functions at local, national and global level, without harming other ecosystems”. One can also mention the act of July 20, 2017 – Water Law²⁹, which in Article 1 specifies that this act regulates water management according with the principle of sustainable development, in particular the shaping and protection of water resources, water use and management of water resources. Further provisions also refer to this rule.

The principle of sustainable development is also considered in activities related to development policy. Pursuant to the Article 2 of the act of December 6, 2006 on the principles of conducting development policy³⁰ development policy is understood as a set of interrelated activities undertaken and implemented in order to ensure sustainable and balanced development of the country, socio-economic, regional and spatial cohesion, raising the competitiveness of the economy and creating new jobs on a national, regional or local scale. This policy is carried out by: The Council of Ministers; province self-government; metropolitan associations; district and commune self-government. In terms of territory, development policy can be global, covering the area of the European Union or its member states and local, concerning territorial units located at the Community (integration grouping) or national (regions) level.

²⁷ Unified text Dz.U. 2018, item 1945 as amended.

²⁸ Unified text Dz.U. 2018, item 2129 as amended.

²⁹ Unified text Dz.U. 2018, item 2268 as amended.

³⁰ Unified text Dz.U. 2018, item 1307 as amended.

Sustainable development is also provided by the laws of March 28, 2003 on rail transport³¹ and of December 16, 2010 on public collective transport³², pointing to plans for the sustainable development of public transport, which are defined as a process of transport development taking into account social expectations regarding ensuring universal access to public collective transport services, aiming at the use of various means of transport, as well as promoting means of transport that are environmentally friendly and equipped with modern technical solutions.

V. Summary

The indicated examples of substantive administrative law provisions do not exhaust their entire list. It can be stated that, apart from the only legal definition contained in the act – Environmental Protection Law for the purposes of interpreting the provisions of this Act and the provisions of other acts to which this act explicitly refers, there is no single general legal definition. The legislator's use of the term "sustainable development" has become quite common. Therefore, it requires individual interpretation in each case against the background of a specific factual state. This interpretation is made by the authorities applying the law, and it is subject to judicial review. In the jurisprudence of courts, the principle of sustainable development is compared with the principle of social coexistence interpreted under civil law.

The principle of sustainable development is undoubtedly a constitutional systemic principle. This is a constitutional value which must be observed by public authorities in the process of establishing and applying the law. It refers not only to ensuring environmental protection, but also to other matters subject to protection, in particular those indicated in the Article 5 of the Polish Constitution. Following the principle of sustainable development in the lawmaking process gives, as a result, the basis for appealing against legal acts incompatible with this principle to the Constitutional Tribunal³³, while the application of this rule by public administration bodies is subject to administrative court control.

³¹ Unified text Dz.U. 2017, item 2117 as amended.

³² Unified text Dz.U. 2018, item 2016 as amended.

³³ Z. Bukowski, *Konstytucyjne podstawy...*, p. 63.

Literature

- Bałaban A., *Konstytucyjna zasada zrównoważonego rozwoju*, [in:] *Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje*, eds. L. Garlicki, A. Szmyt, Warsaw 2003.
- Bukowski Z., *Konstytucyjne podstawy obowiązków państwa w zakresie ochrony środowiska*, "Prawo i Środowisko" 2002, No. 4.
- Bukowski Z., *Zrównoważony rozwój w systemie prawa*, Toruń 2009.
- Krzywoń A., *Konstytucja RP a środowisko*, "Państwo i Prawo" 2012, No. 8.
- Mikosz R., *Zagadnienia wstępne*, [in:] *Zrównoważony rozwój jako czynnik determinujący prawne podstawy zarządzania geologicznymi zasobami środowiska*, ed. G. Dobrowolski, Katowice 2016.
- Pchałek M., [in:] *Prawo ochrony środowiska. Komentarz*, eds. M. Górski, M. Pchałek, W. Radecki, J. Jerzmański, M. Bar, S. Urban, J. Jendrośka, Warsaw 2011.
- Rakoczy B., [in:] *Prawo ochrony środowiska. Komentarz*, eds. Z. Bukowski, E.K. Czech, K. Karpus, B. Rakoczy, Warsaw 2013.
- Sarnecki P., [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. I, eds. L. Garlicki, M. Zubik, Warsaw 2016.
- Ziemblicki B., *Zrównoważony rozwój z perspektywy prawa międzynarodowego i europejskiego*, [in:] *Rozwój trwały i zrównoważony*, "Prace Naukowe Uniwersytetu Ekonomicznego" 2016, No. 452.
- Zimmermann J., *Prawo administracyjne*, Warsaw 2018.